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Recommended Citation

Carl Tobias, *Studying the Federal Appellate System*, 80 *Judicature* 138 (1996)

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Studying the federal appellate system

by Carl Tobias

During the 104th Congress, senators from the Pacific Northwest orchestrated the fourth effort since 1983 to divide the U.S. Court of Appeals for the Ninth Circuit. In December 1995, the Senate Judiciary Committee approved a bill that would have created a new Twelfth Circuit comprising Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington and left California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit.

In March 1996, the bill's sponsors concluded that it would not pass and, therefore, agreed to a compromise that would have authorized a national commission to study the courts of appeals. After this proposal initially languished in the House, interested legislators decided to move the measure late in the session. Congress did appropriate \$500,000 for a national study but failed to authorize it.

The 104th Congress decided against approving a study or dividing the Ninth Circuit partly because both possibilities were controversial. Yet legislative inaction does not necessarily mean that either prospect is dead. Indeed, many who promoted the initiatives have suggested that the upcoming Congress will seriously examine them.

Conditions for a study

The strongest circuit-splitting proponents, such as Senator Conrad Burns (R-Montana), have indicated that they might support a study under certain conditions. First, these advocates want the study completed in time for

the 105th Congress to consider legislation that would implement commission recommendations. Given the need for Congress to introduce bills, hold hearings, and vote on measures, the maximum life of the commission may be only 18 months.

Second, the proponents apparently want the study to emphasize the Ninth Circuit because their concerns principally implicate the court's size and the consistency and substance of its decisions. However, they seem amenable to analysis of additional appeals courts. Third, the advocates apparently want the commission's remedial focus to be structural alternatives, namely circuit splitting. This emphasis concerns many Ninth Circuit judges, most of whom strongly oppose bifurcation, lest the study indicate that division is advisable. Other judges could be concerned that evaluation will reveal deficiencies requiring remediation. For instance, some judges apparently fear that Congress, in the name of "alignment," might combine courts into "jumbo" circuits.

Reconsidering the proposal

Last Congress's Senate proposal required the commission report to be issued within 11 months, a period that was inadequate. Consider, for instance, that both the Federal Courts Study Commission and the Commission on Revision of the Federal Court Appellate System needed 18 months, but they might have compiled better reports with more time.

Similar problems implicating

scope may attend the charge of a re-introduced proposal. The commission was to study the nation's present division into circuits and their structure and alignment with particular reference to the Ninth Circuit while recommending changes in boundaries or structure that would fairly and promptly resolve appeals. The mandate seemed overly narrow. For instance, the proposal did not mention docket growth, the courts' worst problem, although it might have been read to include this and any phenomena that involve the courts' effective operation. The Ninth Circuit focus may be proper because it is the largest court and it experiences special difficulties. However, all circuits have encountered and adopted measures to address mounting appeals, a situation that suggests they are systemic and need systemic treatment.

The third requirement expressly prescribed recommendations for the "expeditious and effective disposition" of appeals but confined such recommendations to appropriate changes in circuit boundaries or structure. This restriction is too limited because many other measures, such as increasing judgeships and procedures that appeals courts use to expedite disposition, can treat docket growth. Problems in the Senate proposal do not mean that national analysis of the courts of appeals is unwarranted. There actually is a strong need to evaluate the courts before multiplying caseloads overwhelm the system and further dilute appellate justice by, for example, additionally decreasing the number of oral arguments afforded or published opinions issued.

Suggestions

The 105th Congress must promptly consider a study and broadly view the time and scope prescribed. The commission needs at least 18, but preferably 24, months to conclude its work. This allocation would permit the entity to assemble, assess, and synthesize the maximum applicable information and to develop the most

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efficacious recommendations. Congress could easily expand the study's scope by deleting certain strictures in the Senate proposal. For instance,

the "study" limitations relating to "structure and alignment" and to the Ninth Circuit should be omitted, although the problems that some ascribe to structure and this court's size mean that any national analysis will probably stress them. The "recom-

mendations" stricture relating to "changes in circuit boundaries or structure" might also be deleted because there are many other promising approaches. ☞

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Technology reduces judicial ballot roll-off

by Stephen M. Nichols

A perennial problem in judicial elections is ballot roll-off. Also known as voter fatigue, roll-off is the long-observed decline in the number of votes cast as one moves down the ballot—presumably the result of differences in citizen knowledge and interest concerning high-profile, upper-ballot races versus the lower-profile contests, including judicial elections, below them. Roll-off in a given judicial race often exceeds 50 percent. An emerging development in ballot technology—the electronic voting machine—may substantially reduce roll-off.

Most jurisdictions throughout the country have for decades relied on decidedly low-tech ballot devices, including cumbersome lever-pull voting machines, paper ballots, punch cards, and the like. As these instruments fall into disrepair, and as advances in computer ballot technology make them increasingly obsolete, election officials are investing in more sophisticated electoral instruments. Indeed, roughly two-thirds of the votes cast in the 1992 general election were recorded on some type of computerized voting device.¹

Among the most popular of these high-tech alternatives is the "ELECTronic 1242" electronic voting devices manufactured by Danaher Controls of Gurnee, Illinois, and a comparable system produced by the Indianapolis-based MicroVote Corporation. These machines have been used in more than 15,000 local, state, and national elections. Their popularity owes to their advantages over the mechanical de-

vices they have supplanted. Compared to older voting instruments, these systems are lighter, more compact, and thus more easily stored; they tabulate votes with considerably greater speed and accuracy; and they claim to provide enhanced security against election fraud.

In addition, the ELECTronic and MicroVote machines are "voter-friendly," in that they help the citizen keep track of the voting task. Both devices have flashing red lights located above every race on the ballot: the light atop a given contest continues to flash until the voter records a choice in that contest.

The flashing red lights appear to have the intended effect: few voters, it seems, are able to ignore a prominent, visual reminder that they have not yet voted in a given ballot race. Two recent studies underscore the effectiveness of the electronic voting devices in lowering ballot roll-off.

An examination of Columbus, Ohio, electoral wards using older, manual voting instruments versus those using the ELECTronic machines during the 1992 general election revealed significantly less voter fatigue associated with the latter systems. Wards employing the electronic devices showed roll-off declines in some ballot contests of up to 20 percent as compared to areas using the manual systems. While this study examined machine effects across the ballot, the impact was especially noteworthy in two types of ballot contests known to produce inordinately high levels of ballot roll-off: uncontested races and judicial elections.

A subsequent research effort focused specifically on the impact of electronic voting systems on judicial races in the 1992 and 1995 Kentucky Supreme Court elections. In this study, Kentucky counties using either the ELECTronic or MicroVote instruments experienced on average 26 percent less ballot roll-off than did counties voting with other ballot systems. The contention that the machines were the source of the observed roll-off differences in Columbus wards and Kentucky counties is bolstered by the fact that the empirical analyses in both studies incorporated statistical controls for a number of other sources of voter fatigue (such as ward and county differences, socioeconomic status, race, age, and residential mobility).

Clearly, then, judicial ballot roll-off can be significantly reduced by using electronic voting machines. However, increased voting does not necessarily mean more informed voting. Indeed, one might well question the reasoning behind a vote cast in response to a flashing red light. What's needed is more substantively meaningful information for voters, which in turn provides a better basis for the vote choice. The spread of electronic voting machines, combined with the emergence of more informative campaigns for the bench, may then improve not just the quantity but also the quality of votes cast in judicial elections. ☞

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1. Harrar, *Fear of Fraud: As Technology Enters Voting Booth, Stakes Rise*, THE RECORD, May 12, 1992.